

This Opinion is Not a
Precedent of the TTAB

Mailed: March 21, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Monster Energy Company
v.
Jamal Jalen Carter
—

Opposition No. 91255846

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Steven J. Naptaupsky, Lynda Zadra-Symes, Matthew S. Bellinger
and Nicole R. Townes of Knobbe, Martens, Olson & Bear, LLP
for Monster Energy Company.

Jamal Jalen Carter, *pro se*.

—
Before Cataldo, Adlin and Allard,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Jamal Jalen Carter, who is representing himself in this proceeding,
seeks registration of the mark shown below



for “t-shirts” in International Class 25.¹ In its notice of opposition, Opposer Monster Energy Company pleads prior use and registration of a stylized “M” mark in the form of a claw, as shown below



for clothing, including t-shirts.² Opposer also pleads prior use and registration of its “M” claw design mark, often with the words MONSTER ENERGY or other features, for energy drinks (Opposer’s primary product), and a variety of “ancillary” goods in addition to clothing.³ As grounds for opposition, Opposer alleges that use of Applicant’s mark would be likely to cause confusion with, and dilute, Opposer’s marks. In his answer, Applicant denies the salient allegations in the notice of opposition.

¹ Application Serial No. 88661453, filed October 20, 2019 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce. The application includes this description of the mark: “The mark consists of three red scratch marks behind the term ‘HVNGRY’ in white all against a black background.”

² Registration No. 4051650, issued November 8, 2011; renewed (the “’650 Registration”). The ’650 Registration includes this description of the mark: “The mark consists of a stylized letter M in the form of a claw.” *See also* Registration Nos. 3908601, 5551230, 5580962, 5570782 and 5813698, all of which identify clothing. Opposer acquired the ’650 Registration and some of its other pleaded registrations from Hansen Beverage Company.

³ Registration Nos. 5580962, 5570782, 4332062, 4822675, 3963669, 3963668, 2903214, 3434821, 3434822, 3134841, 4011301, 5022676, 3908600, 5820903, 5008850, 4849688 and 4768827,

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced:

First Notice of Reliance ("NOR 1") on its pleaded registrations, Hansen Natural's⁴ and Monster Beverage Corporation's⁵ 10-K reports filed with the U.S. Securities and Exchange Commission ("SEC"), and Applicant's responses to Opposer's discovery requests. 7-26 TTABVUE.⁶

Second Notice of Reliance ("NOR 2") on printed publications. 35 and 27-28 TTABVUE.

Third Notice of Reliance ("NOR 3") on Internet printouts. 29-33 TTABVUE.

Fourth Notice of Reliance ("NOR 4") on Opposer's discovery deposition of Applicant, and the exhibits thereto. 34-35 TTABVUE ("Carter Disc. Dep. Tr.").

Fifth Notice of Reliance ("NOR 5") on Internet printouts. 36 TTABVUE.

Testimony Declaration of Rodney Sacks, its Chairman and Co-Chief Executive Officer, and the exhibits thereto ("Sacks Dec."). 37-43 TTABVUE.

Applicant did not take any testimony or introduce any other evidence.⁷

⁴ Hansen Natural was apparently the parent of Hansen Beverage Company, assignor of some of Opposer's pleaded marks.

⁵ Hansen Natural apparently changed its name to Monster Beverage Corporation.

⁶ Citations are to TTABVUE, the Board's online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁷ Applicant filed his Trial Brief one day late, and as a result we have not considered the brief. Trademark Rule 2.128(a)(1); 5 TTABVUE.

II. Entitlement to a Statutory Cause of Action⁸

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, Opposer's pleaded registrations, 1 TTABVUE 36-140, and prior use of its pleaded marks, 37 TTABVUE 3 (Sacks Dec. ¶ 3), establish that it is entitled to oppose registration of Applicant's mark on the grounds of likelihood of confusion and dilution. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed.

⁸ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001 at *10 n.39 (TTAB 2021) (citing *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388 at *2 (TTAB 2020)).

Cir. 2000) (registration establishes “standing”); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark “is sufficient to support opposer’s allegations of a reasonable belief that it would be damaged ...” where opposer alleged likelihood of confusion).

III. Priority

Because Applicant has not counterclaimed to cancel any of Opposer’s pleaded registrations, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). In addition, Opposer has established prior common law use of its pleaded marks for clothing, beverages and a wide variety of additional products. 37 TTABVUE 3-57 (Sacks Dec. ¶¶ 3-155 and Exs. 1-64).

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

We focus our analysis on Opposer's pleaded mark in the '650 Registration:  . If we find confusion likely between that pleaded mark and Applicant's involved mark, we need not consider the likelihood of confusion between Applicant's mark and Opposer's other pleaded marks. On the other hand, if we find no likelihood of confusion between the mark in the '650 Registration and Applicant's mark, we would not find confusion likely between Applicant's mark and Opposer's other pleaded marks. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Goods, Channels of Trade, Classes of Consumers and Sales Conditions

The parties' goods are identical because both the involved application and the pleaded '650 Registration identify "t-shirts." Moreover, because the goods are identical, we presume that the channels of trade and classes of purchasers for these goods overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

Furthermore, t-shirts are worn by all types of consumers, for a variety of reasons, may be purchased at retail via simple websites or convenience stores, and are often quite inexpensive. *See* 7 TTABVUE 152-154 (Applicant's response to Interrogatory Nos. 15, 19) (Applicant's goods are sold on Applicant's website to 17-25 year old students with incomes "from \$1,000-\$5,000"); 37 TTABVUE 10-12 (Sacks Dec. ¶¶ 20-25) (consumers acquire Opposer's t-shirts "when they purchase MONSTER drinks and mail in the can tabs," or through a variety of websites or retail stores, and Opposer's t-shirts "can sell for about \$20-\$25"). This factor also weighs in favor of finding a likelihood of confusion.

B. Strength of Opposer's Mark

Before addressing the marks themselves, we consider the strength of Opposer's mark, to ascertain the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength ...").

Turning first to conceptual strength, there is no evidence, and Applicant does not argue, that Opposer's mark is conceptually weak. There is therefore no reason on this record to find "a stylized letter M in the form of a claw" to be anything but arbitrary

for clothing. Thus, Opposer's mark is conceptually strong. *See also* 15 U.S.C. § 1057(b).

As for commercial strength, we must determine where to place Opposer's mark on the "spectrum" of marks, which ranges from "very strong to very weak." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)). *See also, Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017). The record in this case supports Opposer's claim that its mark is not only very strong, but, for likelihood of confusion purposes, famous for energy drinks.

While Opposer has not introduced any consumer surveys showing fame, they are not necessary; indeed, they "rarely appear." *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). Rather, "fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Id.* Other relevant factors include "length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).



By each of these measures, Opposer's  mark is famous for energy drinks. Indeed, the mark has been in use for 20 years. 37 TTABVue 3 (Sacks Dec. ¶ 3). "MONSTER energy drinks are the best-selling energy drinks in the United States,"

and “[e]ach can of the MONSTER ENERGY® beverages bears the Claw Icon mark.” *Id.* at 5, 12 (Sacks Dec. ¶¶ 7, 26). In fact, Opposer sells “more than 2.5 billion” cans of energy drinks per year in the United States. *Id.* at 12 (Sacks Dec. ¶ 26). In the five week period ending on December 26, 2020, Opposer’s share of “the measured Total Non-Alc (TNA) energy drink market by dollar value in the United States” was substantial, albeit confidential. 43 TTABVUE 12 (Sacks Dec. ¶ 26). Furthermore:

Opposer has won many awards, including “Beverage Company of the Year,” “Top 200 Best Small Companies,” “100 Fastest Growing Companies,” “Hot Growth Companies” and “Most Innovative Companies,” several times each. *Id.* (Sacks Dec. ¶ 3).

“The National Inventor Hall of Fame has included the Monster Claw Icon mark among its collection of famous trademarks.” *Id.* at 4 (Sacks Dec. ¶ 4).

Opposer sells over 5 billion cans of energy drink per year worldwide, each of which bears the “M” claw mark. *Id.* at 5 (Sacks Dec. ¶ 7). While Opposer has not specifically quantified its United States sales in depth, it offers its beverages in more than 380,000 retail stores in the United States, and its sales of beverages in red packaging in the United States are impressive by any measure. *Id.* at 7 (Sacks Dec. ¶ 12); 43 TTABVUE 6 (Sacks Dec. ¶ 10).

Opposer’s mark is featured on a wide variety of ancillary products, including not only t-shirts and other types of clothing, but also beverageware, sports bags, towels, umbrellas, clocks, boom boxes, bottle openers, surfboards, barbeque tools, video games, pens, yoga mats and jewelry. 37 TTABVUE 7-8 (Sacks Dec. ¶ 14).⁹

⁹ Opposer’s use of its mark on such a wide variety of goods increases the likelihood of confusion under the ninth *du Pont* factor, “the variety of goods on which a mark is or is not used.” *In re E.I. du Pont*, 177 USPQ at 567. See e.g. *UMG Recordings Inc. v. Mattel Inc.*, 100 USPQ2d 1868, 1884 (TTAB 2011). See also *DC Comics Pan American Grain Mfg. Co. Inc.*, 77

“Since 2002, [Opposer] has spent approximately US\$8.5 billion in promoting its MONSTER brand, including the Claw Icon mark, throughout the world, the vast majority of which occurs in the U.S.” *Id.* at 13 (Sacks Dec. ¶ 27).¹⁰

Opposer extensively promotes products bearing the mark in the pleaded '650 Registration through sponsorships of athletes, teams, stadiums and athletic competitions, with an apparent focus on motor, fighting and extreme sports, though also including “major” sports. *Id.* at 13-15, 18-40 (Sacks Dec. ¶¶ 28-30, 40-104).

Opposer also sponsors concerts/festivals featuring promotional displays of the mark in the pleaded '650 Registration, including the Vans Warped Tour and OzzFest. *Id.* at 15-18 (Sacks Dec. ¶¶ 31-39).

Opposer's websites featuring the mark in the pleaded '650 Registration receive “thousands of unique visitors each month.” In 2019, Opposer's website had over 3.7 million views in the U.S. In 2019 Opposer's Facebook page had more than 26 million “likes,” and in 2018 Socialbakers ranked Opposer “the 10th most followed brand on Facebook.” Opposer's Twitter, Instagram and YouTube accounts all feature the mark in the pleaded '650 Registration, and had over 3 million, 7.2 million and 2.75 million followers or subscribers, respectively. *Id.* at 40-42 (Sacks Dec. ¶¶ 106-112).

Opposer has been featured in the WALL STREET JOURNAL, FORBES, FORTUNE, NEWSWEEK AND BUSINESS WEEK, among others, with the articles sometimes displaying the mark in

USPQ2d 1220, 1226 (TTAB 2005); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1271 (TTAB 2003) (“this factor may favor a finding that confusion is likely even if the goods are not obviously related”); *Uncle Ben's, Inc. v. Stubenberg Int'l, Inc.*, 47 USPQ2d 1310, 1313 (TTAB 1998) (“Section 2(d) of the Trademark Act also covers situations where the public, because of the similarity of the marks, is likely to believe that a recognizably different product, because of the similarity of the marks, emanates from, or is authorized, sponsored or licensed by the prior user or registrant.”).

¹⁰ We acknowledge that Opposer failed to provide advertising figures specific to the mark in the pleaded '650 Registration, but at the same time the record indicates that the packaging for Opposer's beverages universally bears that mark.

the pleaded '650 Registration. *Id.* at 47 (Sacks Dec. ¶¶ 125, 127).

This evidence establishes that the mark in Opposer's pleaded '650 Registration is famous for likelihood of confusion purposes for energy drinks. Where fame exists, as here in connection with energy drinks, it "plays a 'dominant role in the process of balancing the *DuPont* factors,' ... and '[f]amous marks thus enjoy a wide latitude of legal protection.'" *Bose*, 63 USPQ2d at 1305 (quoting *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)). A strong mark such as Opposer's "casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). This factor also weighs heavily in favor of finding a likelihood of confusion.

On the other hand, we must keep in mind that there is no evidence that any of Opposer's marks are famous, or even commercially strong, for clothing. In fact, while Opposer fairly extensively licenses its mark for use on clothing, its royalties from these licenses, while not insubstantial, are not particularly impressive either, especially because Opposer only provided "worldwide" figures and there is no indication how many items of clothing bearing the pleaded marks have been sold in the United States. 43 TTABVUE 8-9 (Sacks Dec. ¶ 16). *See also* 37 TTABVUE 9-12 (Sacks Dec. ¶ 17-25). Opposer concedes that its drink sales represent "more than 90% of [Opposer's] revenue." 37 TTABVUE 12 (Sacks Dec. ¶ 26). *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014) (finding IKEA famous for retail store services in the field of furniture, housewares and home furnishings, but not for other products or services identified in its pleaded registrations).

C. Applicant's Alleged "Bad Faith"

We are not persuaded by Opposer's argument that Applicant acted in bad faith. Applicant's mere knowledge of Opposer's mark, in the absence of additional evidence, falls far short of establishing "bad faith" in adopting his mark, or an intent to deceive. *Action Temporary Services, Inc. v. Labor Force, Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1310 (Fed. Cir. 1989) ("*mere knowledge of the existence of the prior user should not, by itself, constitute bad faith*"). This factor is neutral.

D. The Marks

We must compare the marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay*, 73 USPQ2d at 1691. When we do so, we find that the marks have almost nothing in common, and that they are quite dissimilar overall.

Opposer hangs its hat on the marks' "overall appearance," arguing that "[t]he shape of the claw marks are highly similar. Both of the claw marks have rough, jagged edges ... and ... also have the identical number of claw marks – three." 46 TTABVue 41. We disagree that the marks are similar, because while both marks contain three scratch/claw marks, and the scratch/claw marks are "jagged," the similarities in appearance end there.

First, there are significant differences between the parties' scratch/claw marks. Opposer's claw marks are in the shape of an "M," whereas Applicant's three red scratch marks are apparently not intended to represent a letter, and to the extent they do, they resemble an "S." The evidence does not reveal why consumers would perceive an "M" as similar in any way to "three red scratch marks" or an "S." It is

more likely that they would perceive an M as completely different than “three red scratch marks” or an “S.” Furthermore, Opposer’s claw marks are mostly vertical and straight, with the tops of the three marks pointing to the left. By contrast, Applicant’s scratch marks are diagonal, with the tops of the marks pointing to the right.¹¹ Of course, it is also significant that Applicant’s scratch mark design is not the entire mark, or even close, but instead is merely a part of a multi-feature mark including the term HVNGRY in white and a black background. Opposer’s mark, by contrast, is just the stylized “M” in the form of a claw.

In other words, while consumers will perceive Opposer’s mark as merely an “M” or claw, they will perceive Applicant’s mark as multifaceted, with the scratch marks serving to highlight the mark’s literal element by running through the lettering, and the mark’s red, white and black features distinguishing it from the less embellished features of Opposer’s mark. In fact, Opposer’s focus on the three red scratch marks in Applicant’s mark essentially dissects it, which is not the proper way to compare marks. *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered

¹¹ Opposer points out that the mark in its pleaded Registration No. 5820903, , is “tilted at an angle much like” Applicant’s mark. 46 TTABVUE 42. However, Opposer’s “tilted” mark is not registered or used for clothing, and there is no evidence that Applicant’s t-shirts are related to the goods in Opposer’s pleaded Registration No. 5820903. In any event, Opposer’s tilted claw mark is still different than Applicant’s mark.

piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).¹²

Opposer attempts to discount the term HVNGRY in Applicant’s mark by arguing that it is subordinate to the “dominant” three red scratch marks. 46 TTABVUE 41-42. Specifically, Opposer claims that the scratch marks appear at the center of the mark, form a large portion thereof and are its “dominant visual image.” We are not persuaded.

Perhaps most importantly, it is settled that “the verbal portion of a word and design mark likely will be the dominant portion.” *In re Viterra*, 101 USPQ2d at 1911; *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”). There is no reason to deviate from this guiding principle here because consumers will “call for” Applicant’s goods by the mark’s literal element “HVNGRY,” rather than trying to verbalize three red scratch marks forming a relatively minor portion of Applicant’s mark. In fact, Opposer’s arguments to the contrary notwithstanding, the term HVNGRY “appears at the center” of Applicant’s

¹² Opposer points out that it also uses red, white and black in some of its other pleaded marks, and in certain of its packaging for beverages. 46 TTABVUE 42. However, the marks Opposer uses for clothing do not include claims to the color red, and there is no evidence that it uses red in connection with its packaging for clothing.

mark every bit as much as the three red scratch marks do, and forms a “larger portion” of the mark than the scratch marks. Moreover, the six white letters in the mark’s literal element provide a much sharper contrast to the mark’s black background than do the three thinner red scratch marks. We find here, as we typically do, that the literal element of Applicant’s mark is its dominant feature. In short, the marks look quite different.

They sound even more different. In fact, Applicant’s mark will be pronounced exactly as “HVNGRY” would be, presumably not unlike the word “hungry” (or perhaps “hangry”).¹³ By contrast, “obviously the design portion of opposer’s mark,” which is its only portion, “will not be spoken.” *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008).¹⁴

Similarly, the marks convey entirely different meanings. Applicant asserts that his mark stands for “Humility Vn folds Nonchalant Gleeful Relentless Youngins.” 7 TTABVUE 148 (Applicant’s response to Interrogatory No. 3). Whether consumers take this meaning from the mark itself, or perceive its literal element as “HVNGRY” rather than an acronym, Opposer’s mark will not convey a similar meaning, to the extent it conveys any meaning at all. In fact, there is no evidence that an “M” or a

¹³ Asked about the impression his mark gives, Applicant responded “the impression it gives off is being hungry. So constantly trying to achieve your dreams, goals and aspirations in life.” 34 TTABVUE 12 (Carter Disc. Dep. Tr. 15)

¹⁴ In the versions of Opposer’s mark which include words (for example “MONSTER,” “ENERGY” or “HYDRO”), none of those words resemble “HVNGRY” in any way, including in sound, pronunciation or meaning.

claw have anything to do with “HVNGRY,” “Humility Vnfold’s Nonchalant Gleeful Relentless Youngins” or “hungry.”

The marks create much different commercial impressions. Applicant’s mark is the term or acronym “HVNGRY,” which is highlighted by being written in white on a black background with three red scratch/claw marks running through and thus drawing attention to the lettering. Opposer’s mark is a claw-shaped letter “M.” These differences in commercial impression are manifest, even if we accepted Applicant’s unexplained and unsupported argument that both marks “have an edgy impression.” 46 TTABVue 43.

In short, the marks are quite different in their entireties. This factor weighs heavily against finding a likelihood of confusion.

E. Conclusion Regarding the Likelihood of Confusion

Here, despite the fame of Opposer’s marks for energy drinks, the identity of the goods and their overlapping channels of trade, and consumers’ tendency to purchase t-shirts on impulse rather than with care, the marks  and  are simply too different for confusion to arise. While consumers may perceive each mark as including, in Opposer’s words, “three claw marks,” the marks’ similarity in appearance ends there. The marks otherwise look completely different in their entireties, they sound nothing alike, convey disparate meanings and the commercial impressions they create are poles apart. Confusion is therefore unlikely. *See Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be

dispositive.”). *See also Boston Red Sox Baseball Club L.P. v. Sherman*, 88 USPQ2d 1581, 1593 (TTAB 2008) (“We find, having given due consideration to the fame of opposer’s mark, and notwithstanding all the other factors in opposer’s favor including the identity of the goods and the impulse nature of their purchase, that the marks in this case are simply too dissimilar to support a finding of likelihood of confusion.”); *Stouffer Corp. v. Health Valley Natural Foods Inc.*, 1 USPQ2d 1900, 1906 (TTAB 1986), *aff’d*, 831 F.2d 306 (Fed. Cir 1987) (“while the fame of opposer’s mark and the identity of the parties’ goods and their channels of trade tend to favor opposer’s case, we are not persuaded that these circumstances are sufficient to refuse registration to applicant in view of our finding that LEAN CUISINE and LEAN LIVING, applied to the goods herein are not confusingly similar in sound, appearance or commercial impression”).

V. Dilution

Opposer alleges dilution by blurring. 46 TTABVUE 50. To prevail, it must show that: (1) it owns a famous mark that is distinctive; (2) Applicant is using a mark in commerce that allegedly dilutes Opposer’s famous mark; (3) Applicant’s use of its mark began after Opposer’s became famous; and (4) Applicant’s use of its mark is likely to cause dilution by blurring or tarnishment. *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1502 (TTAB 2015) (quoting *Coach Servs.*, 101 USPQ2d at 1723-24). Applicant has not met its burden, because it cannot establish elements (1) or (4).

Turning first to element (1), “dilution fame is difficult to prove.” *Coach Servs.* 101 USPQ2d at 1724. Here, Applicant has not established that its marks are sufficiently

“famous” to be entitled to protection against dilution, because the record does not show that any of Opposer’s marks are “widely recognized by the **general consuming public** of the United States as a designation of source of the goods or services of the mark’s owner.” *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1502 (TTAB 2015) (quoting 15 U.S.C. § 1125(c)(2)(A)) (emphasis added).

The operative word here is “general.” Indeed, “[b]y using the ‘general consuming public’ as the benchmark, the TDRA [Trademark Dilution Revision Act] eliminated the possibility of ‘niche fame,’ which some courts had recognized under the previous version of the statute.” *Coach Servs.*, 101 USPQ2d at 1724. Now, under the TDRA, “fame for dilution requires widespread recognition by the general public. 15 U.S.C. § 1125(c)(2)(A) ... An opposer must show that, when the **general public** encounters the mark ‘in almost any context, it associates the term, at least initially, with the mark’s owner.’ In other words, a famous mark is one that has become a ‘household name.’” *Id.* (citations omitted) (emphasis added).

Thus, while “niche” fame is sufficient to establish fame for likelihood of confusion purposes, it is not sufficient to establish fame for dilution purposes. As the Federal Circuit held in *Coach Servs.*, a mark can acquire “sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame.” *Id.* at 1724.

Here, while the record shows that Opposer’s marks are famous for energy drinks, that is as far as the marks’ fame extends. Indeed, for the most part, Opposer’s impressive sales and advertising figures, significant market share and widespread

media exposure all relate to its energy drink business specifically, rather than clothing or other goods or services. The evidence of record concerning Opposer's clothing and other products is underwhelming, and the record as a whole comes nowhere close to establishing the widespread recognition among the general consuming public necessary to establish fame for dilution purposes. For this reason alone, Opposer's dilution claim fails. 15 U.S.C. § 1125(c)(2)(B) (dilution by blurring is "association arising from the similarity between a mark or trade name and **a famous mark that impairs the distinctiveness of the famous mark**") (emphasis added).

Turning to element (4) of the test for dilution by blurring, Opposer cannot establish that use of Applicant's mark will dilute Opposer's marks, by blurring or otherwise, because the statute requires an "association **arising from the similarity between a mark or trade name and a famous mark.**" *Id.* (emphasis added). Here, as explained above in connection with Opposer's likelihood of confusion claim, the marks are dissimilar in their entireties, which precludes a finding of dilution, because consumers will not "conjure up" Opposer's mark when they see Applicant's. Applicant's mark is simply too different from Opposer's for that to occur. *Nat'l Pork Board v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1497 (TTAB 2010) ("an important question in a dilution case is whether the two involved marks are **sufficiently similar** to trigger consumers to conjure up a famous mark when confronted with the second mark") (emphasis added); *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1183 (TTAB 2001) ("blurring occurs when a substantial percentage of consumers, upon seeing the junior party's use of a mark on its goods, are immediately

reminded of the famous mark and associate the junior party's use with the owner of the famous mark, even if they do not believe that the goods come from the famous mark's owner").

In short, because Opposer has not proven that its stylized "M" mark in the form of a claw is famous for dilution purposes, or similar to Applicant's HVNGRY & Design mark, Opposer has not established dilution by blurring.

VI. Conclusion

The marks  and  do not look or sound alike, convey similar meanings or create similar commercial impressions. In fact, they are quite different. They are therefore unlikely to be confused. The marks' significant differences also preclude the possibility that Applicant's mark will dilute Opposer's, by dilution or otherwise, even if Opposer had established fame for dilution purposes, which it failed to do.

Decision: The opposition is dismissed.